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In the Supreme Court of the United States

October Term, 1967

No. 1344

SALEM BUILDING TRADES COUNCIL, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

CASCADE EMPLOYERS ASSOCIATION, INC.,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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vs.

NATIONAL LABOR RELATIONS BOARD,
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and

CASCADE EMPLOYERS ASSOCIATION, INC.,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Salem Building Trades Council, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on February 15, 1968.

CITATIONS TO OPINIONS BELOW

The National Labor Relations Board issued its conclusions and order on February 20, 1967. This is reported in 163 NLRB No. 9. The opinion of the Court of

Appeals, affirming *per curiam*, is not yet reported. It is printed in Appendix B, infra 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1968, infra 3a. Petitioners did not ask for a rehearing. The jurisdiction of the Court is invoked under 28 USC, §1254 (1).

QUESTIONS PRESENTED

1. Whether the use of the present tense in Section 8(b)(4)(ii)(B) of the Labor Management Relations Act, which makes it an unfair labor practice to force or require any person ". . . to cease doing business with another," restricts its application to those situations where a business relationship exists at the time of the union conduct.

2. Whether the protection afforded consumer picketing by *NLRB v. Fruit & Vegetable Packers (Tree Fruits)*, 377 US 58 (1964), applies to consumer picketing by Building Trades Unions.

3. Whether the failure of secondary employers to show any economic loss as a result of picketing precludes a finding of a violation of Section 8(b)(4)(ii)(B) of the Labor Management Relations Act.

4. Whether informational patrolling of premises

built under substandard conditions, which does not induce work stoppage, cessation of business, or economic loss, is protected by the First Amendment's guarantee of free speech.

5. Whether the National Labor Relations Board has the inherent power to assume or infer, without notice, critical adjudicative facts not in evidence.

STATUTE INVOLVED

The relevant provisions of the statute involved, the Labor Management Relations Act (61 Stat. 136, 73 Stat. 519, 29 USC, §151, et seq.) are printed in Appendix A, infra 1a.

STATEMENT

1. The Factual Background.

The facts are undisputed and were stipulated to by both parties. The Salem Building Trades Council, AFL-CIO, has had a labor dispute with Reimann Construction Company since January of 1963, over the substandard wages and working conditions of its employees (R. 24). The wages and other benefits paid by Reimann were substantially below the rates prevailing in the Salem, Oregon, area (R. 26-27).

Reimann was awarded a contract in early 1965 to construct a new motel, the Hyatt Lodge, near Salem,

Oregon. Northridge Industries, Inc., owned this new motel (R. 24). Reimann, using nonunion carpenters and laborers, completed the new motel and left the premises on October 11, 1965 (R. 25). Prior to this time, no picketing took place. Between November 8 and December 20, 1965, pickets from the Salem Building Trades Council patrolled outside the premises of the new Hyatt Lodge (R. 25).

In June of 1965, Reimann was engaged by Candelaria Investment Co., an Oregon corporation, to build a new shopping center in Salem, Oregon, to be called the Candelaria Shopping Center (R. 25). Here, too, Reimann completed the building with nonunion carpenters and laborers. This project was completed on October 14, 1965, and Farrell's Ice Cream Parlor, one of the new tenants, opened for business in the premises on November 9, 1965 (R. 25). Between November 9 and November 15, 1965, pickets from the Salem Building Trades Council sporadically patrolled near Farrell's premises (R. 26).

In both instances, the picketing took place only after Reimann had permanently vacated the premises. In each case, the picket placards contained the legend, "This/Building/Built Under/Sub-Standard/Wages and Conditions/By/Reimann Construction Company/Salem Building Trades Council" (R. 25-26). Pick-ups and de-

liveries did not diminish during the picketing, and the employees of both Hyatt and Farrell's continued working during this period (R. 27, 40). At the time of the picketing, there was no existing business relationship between Hyatt and Reimann or between Farrell's and Reimann (R. 24-27, 35-36).

2. Proceedings Before the National Labor Relations Board.

As a result of the picketing, the Cascade Employers Association, Inc., a group both Hyatt Lodge and Reimann belonged to, filed unfair labor practice charges, and a complaint was issued by the General Counsel on December 17, 1965 (R. 9-13).

The parties entered into a stipulation of facts before the Board and waived proceedings before a Trial Examiner. On February 20, 1967, the Board issued its conclusions and order (163 NLRB No. 9). That portion of the complaint based on Section 8(b)(4)(i)(B) of the Act was dismissed on the grounds that there was no evidence that the Respondent's conduct was calculated to invite neutral employees to make common cause by engaging in work stoppages. The Board then concluded that the Petitioner's picketing violated Section 8(b)(4)-(ii)(B) of the Act, on the ground that the picketing was for the purpose of forcing Farrell's and Hyatt to cease doing business with Reimann.

In its opinion, the Board ordered the Petitioner to cease and desist from threatening, coercing or restraining the named employers, or any other persons, in a manner prohibited by Section 8(b)(4)(ii)(B), and required petitioner to post appropriate notices and provide signed copies of the notice to the employers for posting on their premises (R. 40-42).

3. Proceedings in the Court of Appeals.

Petitioner declined compliance with the Board's conclusion and order. On August 24, 1967, the Board's General Counsel petitioned the Ninth Circuit for an order of enforcement (R. 44). The matter was briefed, and after oral argument, the Court of Appeals issued a *per curiam* opinion on January 22, 1967, affirming the Board's action (Infra, 3a). On February 15, 1968, the Court of Appeals issued its formal decree ordering the petitioner to comply with the Board's orders.

4. Pending Actions.

In late 1965, two damage actions were instituted against the Salem Building and Construction Trades Council, arising out of the picketing in question here. Both actions were based on Section 303 of the Act (29 USC, §187(b)). In *Reimann Construction Co. v. Salem Building & Construction Trades Council*, Civ No 65-574 (D Ore), the plaintiff sought $90,000 plus "all further

damages." In *Hyatt Chalet Motels, Inc., v. Salem Building & Construction Trades Council*, Civ No 65-573 (D Ore), the plaintiff sought $28,000 plus "all further damages." Both complaints have recently been amended, with the prayer in *Reimann* being increased to $148,000, and the prayer in *Hyatt* being increased to $30,000.

These actions had been postponed pending a final determination of the questions raised in this case, but have now been given a firm trial date for June of 1968.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT, BUT SHOULD BE, SETTLED BY THIS COURT.

This case presents for decision several questions, some of first impression, which are of extreme importance to the federal law governing labor management relations. Their resolution would lessen uncertainty in this field.

A. Interpretation of the "Cease Doing Business" Clause of 8(b)(4)(ii)(B).

Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union to force or require any person ". . . to cease doing business with another." Congress, in drafting this particular section, chose to use the present tense. It is presumed that the legislature,

in phrasing a statute, knows the ordinary rules of grammar, and that the grammatical reading of the statute gives its correct sense. See, e.g., *United States v. Goldenberg*, 168 US 95 (1897). Prior to this case, the Courts and the Board, when construing this particular language, have held that it requires an *existing* business relationship. *NLRB v. Milk Wagon Drivers Union, Local 753*, 335 F2d 326, 328 (7th Cir. 1964); *Hoffman v. Joint Council of Teamsters No. 28*, 230 F Supp 684, 688 (ND Cal ND, 1962) (construing Section 8(e) of the Act); *Local 3, International Brotherhood of Electrical Workers*, 140 NLRB 729, 730 (1963). This Court has often stated that the statute, when used to impede peaceful picketing, is to be strictly and cautiously construed. See e.g., *NLRB v. Fruit & Vegetable Packers (Tree Fruits)*, 377 US 58, 62-64 (1964); *NLRB v. Drivers Local Union*, 362 US 274, 284 (1960).

Section 7 of the Act, as amended in 1947, guarantees labor the right to engage in concerted activities. 61 Stat 140 (1947), 29 USC, §157. Section 13 permits limitations on that right only as specifically provided for. 61 Stat 151 (1947), 29 USC, §163. Section 13 has been applied to picketing. *NLRB v. Drivers Union*, supra, n. 9; cf. *International Union, U.A.W. v. Wisconsin Employment Relations Board*, 336 US 245, 259-60 (1949). Section 13 declares a rule of construction which cautions against an expansive reading of the Act, which would

impinge upon labor's right to enter into concerted activities. *NLRB v. Drivers Union*, supra, at 282.

Here, the stipulation of the parties, which constituted the entire record, made it clear that at the time of the picketing there was no existing business relationship between Reimann, on the one hand, and Farrell's, Candelaria, and Northridge, on the other (R. 24-27, 35-36). There was no indication of any future business relationship between the parties, and this was acknowledged by the Board (R. 35-36). Petitioner contended that the use of the present tense in the Act, together with the above authorities, precluded a violation of that Section.

The Board found a violation, and this was affirmed by the Court of Appeals. Although the Act has been in effect over 20 years, neither the Board nor the Courts had previously interpreted that section to cover a situation where there was admittedly no business relationship at the time of the picketing. This section is an integral part of the secondary boycott aspects of the Act. The Board's determination will have widespread repercussions. This unprecedented interpretation should be reviewed.

B. The Application of The Consumer Picketing Exception to Building Trades Situations.

In *N.L.R.B. v. Fruit & Vegetable Packers (Tree Fruits)*, 377 US 58 (1964) this Court held that peaceful

picketing of products prepared under substandard conditions, at the consumer level, would be nonviolative of the Act if not ". . . attended by the abuses at which the statute was directed." (377 US at 64).

Here, as in *Tree Fruits*, the Union followed the products of the concern to the secondary sites at the consumer level. In both instances, there was no work stoppage or cessation of pick-ups and deliveries. In *Tree Fruits*, the Union directed the public not to purchase a specific product, whereas here, there was no such appeal. The placards merely publicized the fact that the buildings were built under substandard conditions.

The Board here rejected the application of *Tree Fruits*, on the ground that even if the buildings were the product of the employer, such informational picketing could only be employed to "persuade customers not to trade at all" with the secondary employers (R. 39).

The Board's refusal to apply *Tree Fruits* to a Building Trades situation imposes an insurmountable burden upon this large segment of organized labor. If they are unable to follow the product, even in the limited sense of *Tree Fruits*, then the guarantee provided by Section 7 of the Act is, to these members of the labor movement, meaningless. This point should be reviewed.

C. The Absence of Economic Loss.

Prior to this Court's opinion in *Tree Fruits*, the Cir-

cuits were divided as to whether a *per se* violation of Section 8(b)(4)(ii)(B)'s test ("to threaten, coerce, or restrain") was present whenever secondary picketing took place. Some felt that the picketing itself was a violation, even in the absence of a showing of any economic loss. See, e.g., *Burr v. NLRB*, 321 F2d 612 (5th Cir., 1963). Others, such as the Court of Appeals for the District of Columbia, in reviewing the Board's determination in *Tree Fruits*, felt that picketing was not a *per se* violation, but that economic loss was the key. *Fruit & Vegetable Packers & Warehousemen v. NLRB*, 308 F2d 311 (DC Cir 1962), reversed, 377 US 58 (1964).

This Court reviewed the latter approach in *Tree Fruits* and concluded that even economic loss would not result in a violation in certain situations (377 US at 72-73).

This Court's language in that opinion has not, however, settled the question. There is still confusion. By saying that economic loss in itself would not always be sufficient, did the Court also mean that some showing of economic loss was a minimal requirement for a violation? The opinion is not clear.

This case presents the Court with an opportunity to address itself to the question. Here, neither Farrell's, Northridge, nor Candelaria proffered any testimony or statistics as to loss of business. It was stipulated that

there was no work stoppage or diminution of pickups and deliveries. There is, in short, no inference of economic loss.

D. Application of Free Speech.

The decisions seem clear that a violation of Section 8(b)(4)(ii)(B) will be found only if there is evidence *aliunde* that the activity was coercive. *NLRB v. Fruit & Vegetable Packers (Tree Fruits)*, 377 US 58 (1964); *Wholesale Employers, Local 261, v. NLRB*, 282 F2d 824, 826, 827 (DC Cir, 1960); *NLRB v. Brewery Workers*, Local 366, 272 F2d 817, 819 (10th Cir, 1959); *NLRB v. General Drivers, Local 968*, 225 F2d 205, 210, 211 (5th Cir, 1955); cert. denied, 350 US 914.

Here, there was no evidence in the stipulated facts which would indicate any loss of business. In addition, as set forth above, the parties agreed as to the absence of any work stoppage or work disruption. Given these facts, it would seem that the conclusion is inescapable that the Board has decided that peaceful, informational picketing is *per se* coercive. Petitioner feels that such a restriction on the informational patrolling itself is an unconstitutional abridgement of free speech. U. S. Constitution, First Amendment; *Chauffeurs, Teamsters & Helpers Union v. Newell*, 356 US 341 (1957), reversing 181 Kan 898, 317 P2d 817. This aspect of the case presents an important question of federal constitutional

law. Heretofore, the Constitutional issue has been avoided by a finding that some aspect of the union's conduct was indeed "coercive." But in this situation we have none of the normal facts for such a finding, e.g., loss of customers or loss of workers.

Where the language of a statute will bear two equally obvious interpretations, the one clearly in accordance with the Constitution is preferred. See, e.g., *United States v. C.I.O.*, 335 US 106 (1948). Here, the Court might conclude that Section 8(b)(4)(ii)(B) could as easily have been applied in this case in such a way as to allow the uncoercive informational patrolling. The issue is of extreme importance to organized labor. The First Amendment's guarantee of free speech has of late been liberally interpreted in several areas. *Roth v. United States*, 354 US 476 (1957); *United Mine Workers v. Illinois State Bar*, _____ US _____, 19 L ed 2d 426 (1967). Here, the Court would have the opportunity to examine the free speech aspects of an informational picketing situation which is devoid of the traditional indices of "coercion."

2. THIS CASE PRESENTS IMPORTANT QUESTIONS AS TO THE INHERENT POWER OF FEDERAL ADMINISTRATIVE AGENCIES TO INFER ADJUDICATIVE FACTS NOT IN EVIDENCE.

In deciding the issues set out above, the Board as-

sumed (or inferred) several critical facts not contained in the formal stipulation of the parties, which by agreement constituted the entire record in the proceeding. Although these assumed facts are inseparably connected with several of the issues, they are collectively dealt with here because of the importance of viewing them *in toto*.

The Board declared that even if an existing business relationship was necessary for an 8(b)(4)(ii)(B) violation, that requirement would be met because Reimann was a potential contractor for future new business sites of the secondary employer involved (R. 37). In conjunction, the Board concluded that the secondary employers had experienced growth in the past and would probably continue to expand in the future (R 36-37). Nowhere in the stipulation, however, is there mention that any of the secondary employers had used Reimann in the past, or intended to do so in the future. The Board's opinion acknowledged as much (R 35-36). In addition, there was nothing to indicate that any of those concerns had plans of expanding, either nationally or in the Salem area, or that they had experienced growth in the past.

With regard to the Board's conclusion that the picketing was "coercive," thus preventing free speech guaranties from entering the picture, the Board made two

critical inferences. First, it concluded that the petitioner's failure to picket Reimann's general offices evidenced that the activity was solely designed to inflict damage on innocent neutrals, forcing them to bring pressure on Reimann. (R. 39)[1]. Nowhere in the record is there any indication that Reimann's general offices were not picketed. The stipulation simply did not encompass this aspect of the case. Secondly, the Board points to a threat made to Hyatt by a separate, state-wide labor association, as evidence of petitioner's evil intent (R. 38). Beside the fact that this threat was never carried out, there is nothing in the record which would show an agency relationship, or any connection (direct or indirect) between petitioner and this other association.

These assumed facts, none supported in the record, were critical to the Board's determination. This aspect of the case presents this Court with an opportunity to review the inherent powers of federal administrative agencies to assume, or infer, facts not in evidence.

When an agency determines (or assumes) facts concerning the immediate parties before it—who did what, where, when, how, and with what motive and intent—the agency is performing an adjudicative function and is developing adjudicative facts. Opposed to

1. The General Counsel's brief before the Circuit Court, at pp. 15-16, also indicates the great weight which the Board gave this supposed "fact."

these adjudicative facts are legislative facts, which do not concern the immediate parties. Adjudicative facts must be supported by the evidence, but legislative facts need not be. Davis, *Administrative Law Text*, §15.03 (1958). This Court has recognized the distinction. In *Gonzales v. United States*, 348 US 407, 413 (1955), the Court distinguished several cases on the ground that "they do not involve individualized fact finding and classification, but legislative determinations, political judgments, and the exercise of judicial discretion . . .".

But this Court has not yet clarified the continuing question of whether parties should be notified of, and allowed to rebut, adjudicative facts not in the record, which the agency intends to find. Neither has this Court yet determined whether an administrative agency has the inherent power to infer or assume critical adjudicative facts which are not in evidence.

The field of administrative law is expanding more rapidly than any other. One of the initial questions in this broad area is the power of agencies to assume or infer facts, either to reach a sought conclusion or to bolster one previously determined. It is crucial that some guidelines be established in order to add a semblance of certainty and order to the field. Such guidelines should emanate from this Court. This case presents an opportunity to closely examine this important question.

CONCLUSION

Petitioner believes that the petition should be granted for the foregoing reasons.

Respectfully submitted,

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April 9, 1968.

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: * * *

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are

distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Sec. 8 (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b) (4) (B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, and CASCADE EMPLOYERS ASSOCIATION, INC., *Intervenor*, vs. SALEM BUILDING TRADES COUNCIL, AFL-CIO, *Respondent*.	No. 21,888

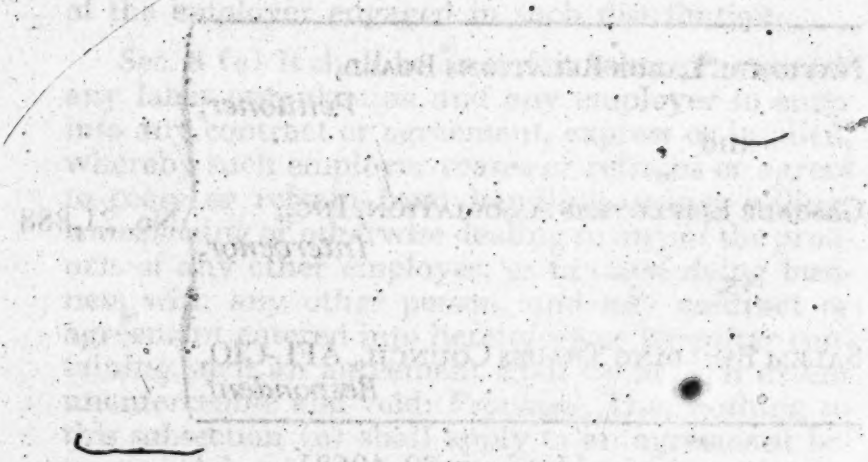
[January 22, 1968]

On Petition for Enforcement of an Order of the National Labor Relations Board.

Before: JERTBERG and BROWNING, Circuit Judges, and BOLDT, District Judge.

PER CURIAM:

The petition of National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended, (29 U.S.C. § 151 et seq.), for a decree enforcing the order of the Board issued against the Salem Building Trades Council, AFL-CIO, on February 20, 1967, is granted for the reasons stated and the authorities cited in the Board's decision and order reported at 163 N.L.R.B. #9.



APPENDIX C

163 NLRB No. 9

D-9552
Salem, Oregon

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

SALEM BUILDING TRADES
COUNCIL, AFL-CIO

and

Case No. 36-CC-155

CASCADE EMPLOYERS ASSOCIATION, INC.

DECISION AND ORDER

Upon a charge and an amended charge filed on October 9, 1965, and December 10, 1965, respectively, by Cascade Employers Association, Inc., for and on behalf of its employer-members, Reimann Construction Co., herein called Reimann, and Hyatt Lodge, the General Counsel of the National Labor Relations Board by the Regional Director for Region 19 issued a complaint dated December 17, 1965, against the Salem Building Trades Council, AFL-CIO, herein called Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner,

were duly served upon the Respondent and the Charging Party. On January 17, 1966, Respondent filed its answer admitting certain allegations of the complaint, but denying the commission of any unfair labor practices.

On March 28, 1966, the Respondent, the Charging Party, and the General Counsel entered into a stipulation of facts wherein they identified the contents of the record in this case and agreed to transfer this proceeding directly to the Board for issuance of a Decision and Order after the filing of briefs and without further hearing. The stipulation states in substance that the parties waive their rights to a hearing before a Trial Examiner and to the issuance of a Trial Examiner's Decision, and that the charge, amended charge, complaint, answer, and the stipulation and exhibits attached hereto should constitute the entire record in this case. On April 7, 1966, the Board approved the stipulation, ordered transferral of the proceeding to the Board, and granted permission to the parties to file briefs. Briefs were filed by the Respondent, Charging Party, and General Counsel.

Upon the basis of the aforesaid stipulation and the entire record in the case, and having considered the briefs of the parties, the Board makes the following:

Findings of Fact

I. The Business of the Employers

Reimann Construction Co. is an Oregon corporation engaged as a general contractor in the building and construction industry with its principal office and place of business at Salem, Oregon. In the operation of its business during the last fiscal year, Reimann performed general contracting services valued in excess of $500,000. During the same period, Reimann purchased goods and materials valued in excess of $10,000 which were transported to it directly from locations outside the State of Oregon.

Northridge Industries, formerly known as Hyatt Chalet Motels, Inc., and herein called Northridge, is a California corporation with its principal office and place of business at Sepulveda, California. It is engaged in the ownership and operation of some 38 motels, in 14 States including Oregon, primarily for the accommodation of transients. In the course and conduct of its business operations during the past year, Northridge received at least $1,000,000 gross revenue, of which more than 75 percent was received from transient guests.

During April 1965, Northridge entered into a contract with Reimann for construction of a motel, herein called Hyatt Lodge, for a contract price of about $208,000.

During June 1965, Candelaria Investment Co., an Oregon Corporation, herein called Candelaria, entered into a contract with Reimann for the construction of a building within the Candelaria Shopping Center. Subsequently, Candelaria leased this building to Farrell's Ice Cream Parlor, herein called Farrell's.

The parties concede, and we find, that Reimann and Northridge are now, and have been at all times material herein, employers within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[1]

II. The Labor Organization Involved

The parties concede, and we find, that Salem Building Trades Council, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The Respondent and Reimann, the primary employer, have been engaged in a labor dispute since January 1, 1963, purportedly because the carpenters and laborers employed by Reimann receive wages, and work under conditions, that are substantially inferior to those provided for under union contracts in the Salem, Ore-

1. As Reimann, the primary employer herein, meets the Board's minimum commerce requirements, jurisdiction is asserted in this case over Northridge, Candelaria, and Farrell's without further inquiry. See *Truck Drivers Local Union No. 649, etc. (Jamestown Builders Exchange, Inc.)*, 93 NLRB 386, 387; *Journeymen Barbers, Hairdressers, etc. (Chicago and Illinois Hairdressers Assn.)*, 120 NLRB 936, 938.

gon area. The Respondent does not have a labor dispute with Northridge, Candelaria, or Farrell's.

As heretofore indicated, in April 1965, Northridge entered into a contract with Reimann for the construction of the Hyatt Lodge Motel, and in June 1965, Candelaria engaged Reimann for the construction of a building within the Candelaria Shopping Center.[2] Reimann, employing nonunion carpenters and laborers, completed work on the motel October 11 and on the shopping center building October 14. Hyatt Lodge opened for normal motel business immediately upon completion, and Farrell's Ice Cream Parlor, the tenant in Candelaria's new building, began retail operations on November 9, 1965.

The Respondent picketed the premises of Hyatt Lodge between November 8 and December 20, 1965, and that of Farrell's sporadically between November 9 and November 15, 1965. In both situations the picketing occurred during regular business hours, was conducted only at customer entrances and did not interfere with deliveries. No customer was requested not to enter the premises or not to patronize either establishment. The pickets carried signs with the following legend:

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2. The Oregon State Building and Construction Trades Council was informed by the Respondent that Reimann was performing general contracting work at the motel site. The Trades Council advised Northridge, by letter dated May 27, that Reimann was on the unfair list and that unless nonunion firms were removed from the motel job, Northridge would be placed on the same list. Northridge was never placed on such a list.

THIS
BUILDING
BUILT UNDER
SUB-STANDARD
WAGES AND CONDITIONS
BY
REIMANN CONSTRUCTION COMPANY
SALEM BUILDING TRADES COUNCIL

It is alleged in the complaint, *inter alia,* that by its picketing, Respondent threatened, coerced, and restrained Hyatt Lodge and Candelaria, and induced and encouraged their employees and employees of their suppliers, carriers, service firms, tenants and other persons to strike or refuse to perform services, all with an object of forcing those persons who regularly do business with Hyatt Lodge and Candelaria to cease doing such business and forcing Northridge, Hyatt Lodge and Candelaria and prospective customers and persons who regularly do business with Reimann, to cease doing business with Reimann, in violation of Section 8(b)(4)(i)(ii)(B) of the Act.

Absent an existing business relationship between the primary employer and the affected employers at the time of the picketing, Respondent contends it is not possible to find that such picketing was to force or require any person to cease doing business with any other person within the language of Section 8(b)(4)(B) and, therefore, no violation could have occurred. From the

stipulation it is clear that at the time Respondent picketed the motel and the ice cream parlor, Reimann had completed its construction contracts with Northridge and Candelaria and that no business relationship existed between Reimann and Farrell's. There is no indication that the motel, as such, or the ice cream parlor has ever engaged in business with Reimann in the past or intends to do business with Reimann in the future. Nor was evidence presented to establish that Northridge or Candelaria had any specific future plans of like nature. Thus, the threshhold issue presented by Respondent's defense in this case is whether picketing in furtherance of a primary labor dispute, conducted at premises occupied solely by neutral employers, violates Section 8(b)(4)(B) despite the absence of a present business relationship between the employers involved.

In shielding "unoffending employers and others from pressures in controversies not their own,"[3] Section 8(b)(4) of the Act was not limited to situations where such neutrals have an existing business relationship with an employer who is a party to a labor dispute. The Board and Courts have held that "the victim's neutrality" is "conceived to be the central element of Congressional concern in this area," and that Congress did not intend to confine Section 8(b)(4) to a strict and

3. *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692.

precise definition of terms which would limit its application in protecting neutral employers.[4] Accordingly, without conceding the absence thereof, we reject Respondent's contention that an existing business relationship between the primary and secondary employers is an indispensible prerequisite for finding a violation.

Nor, by deferring picketing to periods during which no overt manifestation of business dealings is apparent, has Respondent been able to so obscure the business relationships involved as to make the unlawful object of its picketing unidentifiable. Northridge and Candelaria are engaged in businesses which, as the stipulated record discloses, expand through construction of new facilities. The picketing herein stemmed directly from their having utilized the services of Reimann in the construction of their most recent additions. As a general contractor in the construction industry in the area where both Northridge and Candelaria operate, Reimann remained within that class of employers to whom

4. Indeed, retaliatory picketing growing out of an interunion controversy and enmeshing neutral employers has been found unlawful under this Section where causing a cessation of business between neutral employers by means of picketing was an intermediate step in achieving the end objective of forcing a cessation of picketing by another union at another location. For, "in determining legality of object [the Board] does not differentiate between the ultimate, alternative, conditional, or immediate nature of the various objectives that may be involved in the activities of a [picketing] labor organization." See the Board and Court opinions in *National Maritime Union of America, AFL-CIO (Weyerhaeuser Lines)*, 147 NLRB 1317 and *(Houston Maritime Association, Inc.)*, 147 NLRB 1243, enfd. 342 F. 2d 538 (C.A. 2), cert. denied 382 U.S. 835, and *National Maritime Union of America, AFL-CIO (Delta Steamship Lines, Inc.)*, 147 NLRB 1328, enfd. 346 F. 2d 411 (C.A. D.C.), cert. denied 382 U.S. 840. Also see *International Longshoremen's Association, Local 1224, et al, AFL-CIO (Jess Edwards, Inc.)*, 160 NLRB No. 65, at p. 6.

future construction contracts might be awarded. Thus, it is apparent that at the very least an object of the picketing was forcing and requiring Northridge and Candelaria to refrain from utilizing Reimann's services for any future construction. Further, the nature and location of the picketing indicate that Respondent's conduct was also designed to serve notice on all other persons of the retaliatory economic consequences of retaining or otherwise doing business with Reimann. In our view, the language of Section 8(b)(4)(B) is broad enough to include attempts to preclude neutral employers from using the services of a construction contractor.[5] To hold, as Respondent would have us do, that upon the completion of one contract the neutral employers, by virtue of their past business dealings, become fair game for picketing pressures by a union seeking, as here, to enforce its blacklist of the primary employer, would be to apply that Section in a manner inconsistent with both its terms and the basic policy considerations underlying its enactment.

However, Respondent contends that because the banners used in patrolling before the buildings did not request members of the public not to trade at the ice cream store or not to patronize the motel, it cannot be found that a purpose of the picketing was to cause a

5. Compare the handbilling involved in *N.L.R.B. v. Servette Inc.*, 377 U.S. 46, 55.

cessation of business.[6] We do not agree. Various other factors in addition to the picket sign language may reveal the purpose of a picket line. Here, (1) the timing of the picketing, after the primary employer had completed its work and departed and after neutral employers (the operating division of Northridge and Candelaria's tenant, Farrell's), had occupied the buildings and opened for business; (2) the situs of the picketing, in front of the premises of neutral retail employers neither of whom was purveying to its customers any goods or services produced by the primary employer,[7] with no effort made to mitigate the effect of confrontation by customers and others with the picket line and no steps taken to insure against general economic injury to the building occupants; and (3) the implication to be drawn from the wording of the picket sign, that the premises picketed was encompassed in the labor dispute, all reveal a design to affect some aspect of those neutral business operations.[8] Consideration of these circumstances in light of the foregoing reveals that through the pressures thus placed upon the building occupants by the picket line established between their premises and their

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6. In suport of this argument Respondent quotes the Supreme Court's decision in *N.L.R.B. v. Fruit and Vegetable Packers Local 760 (Tree Fruits)*, 377 U.S. 58, and represents it as holding that a necessary element for finding a violation is the seeking of "the public's assistance in forcing the secondary employer to cooperate with the Union in its primary dispute." In our view this phrase is taken out of context and is misapplied.
7. See *Local 254, Building Service Employees (University Cleaners Co.)*, 151 NLRB 341.
8. Cf. *Chicago Typographical Union No. 16 (Alden Press, Inc.)*, 151 NLRB 1666, 1669.

suppliers and customers Respondent was forcing such persons to cease using the buildings and thus requiring them to cease doing business with the building owners; in turn thereby requiring the owners not to engage the services of Reimann with whom the Respondent had a labor dispute. Such a purpose is consistent with the demand made by the Oregon Trades Council upon Northridge.

Equally untenable are Respondent's contentions that its picketing was protected by the publicity proviso to Section 8(b)(4) and the First Amendment. Respondent claims in this connection that it is entitled under constitutional guarantees of free speech to inform the general public of the fact that the buildings had each been constructed under substandard wage and employment conditions by an employer with whom it has a primary dispute, and that in doing so peacefully and truthfully, its conduct is freed from the interdictions of Section 8(b)(4)(B). We have found that the picketing here had an objective proscribed by Section 8(b)(4)(B). It is well settled that picketing which constitutes proscribed pressures for an unlawful objective is not privileged by the First Amendment of the Constitution and is not excused by the fact that it also may have had an informational purpose.[9]

9. See *Houston Maritime Association*, footnote 4, *supra* at p. 1946; *International Brotherhood of Electrical Workers, Local 501, et al (Samuel Langer) v. N.L.R.B.*, 341 U.S. 694, 705.

Nor do we view the identification of the building as the offending product sufficient to convert Respondent's picketing into lawful primary activity at a secondary situs. As was recently observed by the Circuit Court of Appeals for the Tenth Circuit:[10]

> Broadly stated, the evil to which the 8(b)(4) amendments are directed *is secondary union activity which does not encompass some direct action against the primary antagonist*, ... [Emphasis supplied.]

The picketing here cannot be said to have had any reasonably direct thrust against the primary employer. Indeed, the location and timing disclose that it was designed to avoid a confrontation with the primary employer and his employees. Even assuming, *arguendo*, that identification of the building as the subject of the dispute created an appeal for a consumer boycott of the so-called "product" of the primary employer, such a product boycott would of necessity encompass the entire business of the neutral occupant's premises and therefore the entire business of the secondary employer, and must be said to be "employed to persuade customers not to trade at all with the secondary employer" and "designed to inflict injury on his business generally."[11]

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10. *N.L.R.B. v. Building Service Employees International Union, Local No. 105*, 367 F. 2d 227, 229 (C.A. 10); see also *Millmen and Cabinet Makers Union, Local 550, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Steiner Lumber Company)*, 153 NLRB 1285, enfd. 367 F. 2d 953 (C.A. 9).

11. *N.L.R.B. v. Fruit & Vegetable Packers (Tree Fruits)*, footnote 6, *supra*, at p. 72.

Inasmuch as the instant picketing was not sufficiently identified with, or limited to, the operations of the primary employer to constitute primary activity, but was designed to inflict injury on the secondary employers' businesses generally, for an object of forcing or requiring neutral employers to cease using the product of another producer, in order to force or require secondary employers to cease using the services of or doing business with the primary employer, we find that Respondent did threaten, restrain, and coerce the neutral employers within the meaning of Section 8 (b) (4) (ii) (B) of the Act.[12]

The record fails, however, to disclose any conduct which furnishes a reasonable basis for concluding that Respondent's conduct was calculated to invite neutral employees to make common cause by engaging in work stoppages. Accordingly, we shall dismiss the complaint insofar as it alleges that Respondent violated Section 8 (b) (4) (i) (B) of the Act.[13]

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12. *Alton-Wood River Building and Construction Trades Council, AFL-CIO, et al.*, 154 NLRB 982.

13. The Board has held that peaceful picketing of neutral premises does not automatically fall within the proscription of paragraph (i) of Section 8(b)(4), but that the validity depends upon a consideration of all the surrounding circumstances. See *University Cleaners Co.*, footnote 7, *supra*, at p. 348, enfd. 359 F. 2d 289 (C.A. 1); *Building Service Employees International Union, etc. (Industrial Janitorial Service, Inc.)*, 151 NLRB 1424, 1425, enfd. 367 F. 2d 227 (C.A. 10).

IV. The Effects of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth above, occurring in connection with the operations of Northridge, Candelaria, Hyatt Lodge, and Farrell's as set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action that we find necessary to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, we adopt the following:

Conclusions of Law

1. Reimann Construction Company, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Northridge Industries, Candelaria Investment Company, and Farrell's Ice Cream Parlor are persons

engaged in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

4. By threatening, coercing, and restraining Northridge Industries, Candelaria Investment Company, Farrell's Ice Cream Parlor and other persons, with an object of forcing said persons to cease using the products of Reimann or to cease doing business among them and with Reimann Construction Company, Respondent had engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B), and Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Salem Building Trades Council, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Threatening, restraining, or coercing Northridge Industries, Candelaria Investment Company, Farrell's Ice Cream Parlor, or any other person or persons, where an object thereof is to force or require said persons to cease using the products of Reimann or to cease

doing business among them and with Reimann Construction Company, under circumstances prohibited by Section 8(b)(4)(ii)(B) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their business offices and meeting halls, in Salem, Oregon, copies of the attached notice marked "Appendix."[14] Copies of said notice to be furnished by the Regional Director for Region 36, shall, after being duly signed by the Union's representative, be posted by the Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicious places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to the Regional Director for Region 36 sufficient copies of said notice, to be furnished by him, for posting by Northridge Industries, Candelaria Investment Company, and Farrell's Ice Cream Parlor, if willing.

(c) Notify the said Regional Director, in writing,

14. In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. Feb. 20, 1967.

Frank W. McCulloch, Chairman

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL MEMBERS
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL NOT in any manner prohibited by Section 8(b)(4)(B) of the Act, threaten, coerce, or restrain Northridge Industries, Candelaria Investment Co., Farrell's Ice Cream Parlor, or any other person or persons, by striking or picketing, where in any case an object thereof is to force or require said persons to cease using the products of Reimann or to

cease doing business among them and with Reimann Construction Company.

SALEM BUILDING TRADES COUNCIL, AFL-CIO
(Labor Organization)

Dated _____

By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Persons may communicate directly with the Board's Regional Office, 612 Lincoln Building, 208 SW Fifth Ave., Portland Oregon, 97204 (Tel. No. 226-3351, Ext. 1431), if they have any question concerning this notice or compliance with its provisions.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1344

SALEM BUILDING TRADES COUNCIL, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 3a) is reported at 388 F. 2d 987. The Board's decision and order (Pet. App. 5a-22a) are reported at 163 NLRB No. 9.

JURISDICTION

The decision of the court of appeals was entered on January 22, 1968 (Pet. App. 3a). The petition for a writ of certiorari was filed on April 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

306-807—68

QUESTIONS PRESENTED

1. Whether a union's picketing of a neutral employer's premises constituted unlawful secondary activity in violation of Section 8(b)(4)(B) of the National Labor Relations Act even though, at the time of the picketing, the primary employer has completed his work for the neutral and thus an active business relationship between the two no longer exists.

2. Whether, on the facts of this case, the Board properly concluded that the union, in picketing the neutral employer's premises, was not merely following the "struck product," as permitted by *National Labor Relations Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760* (*Tree Fruits*), 377 U.S. 58, but was urging a boycott of the neutral's entire business.

3. Whether proof of economic injury to a neutral employer is essential to a determination that picketing is unlawful.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix to petition (pp. 1a-2a).

STATEMENT

Since January 1963, petitioner Union had had a labor dispute with Reimann Construction Co., a general contractor in the building and construction industry in the Salem, Oregon, area, over the wages and working conditions of laborers employed by Reimann (Pet. App. 8a). In April 1965, Reimann was engaged by Northridge Industries—owner and operator of a

chain of motels—to build a new motel called the Hyatt Lodge (Pet. App. 7a, 9a). Reimann, using non-union carpenters and laborers, completed its contract for Northridge and left the premises on October 11, 1965, whereupon Hyatt Lodge opened for business (Pet. App. 9a).

In June 1965, Candelaria Investment Co.—which owns, operates, and leases retail store buildings at a location called the Candelaria Shopping Center—engaged Reimann to construct a building at the shopping center. Reimann also performed this contract with non-union carpenters and laborers, and completed work by October 14, 1965 (Pet. App. 8a, 9a). Candelaria's tenant at the new building, Farrell's Ice Cream Parlor, began retail operations on November 9, 1965 (Pet. App. 9a). Neither of the premises were picketed by the union during the construction periods (Pet. App. 9a).

Although the Union had no labor dispute with Northridge, Farrell's, or Candelaria, it nonetheless picketed at the premises of Hyatt Lodge from November 8 to December 20, 1965, and between November 9 and November 15, 1965, picketed sporadically at Farrell's premises (Pet. 9a; R. 25, 26).[1] At both locations the picketing occurred during regular business hours while the occupant of the premises was engaged in normal business operations. The pickets confined their patrolling to the areas around the customer or consumer entrances, and carried signs dis-

[1] "R." refers to the stipulation of facts in Vol. I of the record in the court below, a copy of which is on file with the Clerk of this Court.

playing the following legend (Pet. 9a–10a; R. 25–26): "THIS / BUILDING / BUILT UNDER / SUB-STANDARD/WAGES AND CONDITIONS/BY/ REIMANN CONSTRUCTION COMPANY/SALEM BUILDING TRADES COUNCIL." The picketing did not cause any cessation of work by employees working at the picketed premises or by deliverymen servicing those establishments (R. 27).

Upon charges filed by Cascade Employers Association, to which Hyatt Lodge and Reimann belonged, the Board concluded that the Union's picketing violated Section 8(b)(4)(B) of the Act. The Board found that the picketing, which concededly occurred at the premises of neutral employers, restrained and coerced those employers with an object of forcing them to cease doing business with Reimann (Pet. App. 19a). In so ruling, the Board rejected the Union's contentions that (1) no violation could be found here because there was no existing business relationship between Reimann and the other employers involved at the time of the picketing, and (2) the picketing was privileged under this Court's decision in *National Labor Relations Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760* (*Tree Fruits*), 377 U.S. 58 (Pet. App. 10a–17a). The Board ordered the Union to cease and desist from the unfair labor practices found and to post appropriate notices (Pet. App. 19a–21a). The court of appeals sustained the Board's findings and enforced its order "for the reasons stated and the authorities cited in the Board's decision and order * * *" (Pet. App. 3a).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decision of any other circuit. Accordingly, there is no occasion for further review.

1. Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union to "threaten, coerce, or restrain" a neutral employer, with an object of forcing "any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." Petitioner contends that such an object could not be shown here because the primary employer (Reimann) had completed his contracts before the Union began its picketing at the neutral employers' premises, and there was no evidence that those employers had any specific plans for entering into future business relations with Reimann (Pet. 7–9). The Board properly rejected this contention.

In enacting Section 8(b)(4)(B), Congress' central purpose was to shield "unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692. Consistent with this objective, the Board with judicial approval, has interpreted that section as applicable to a wide variety of secondary boycott situations other than the conventional one where the neutral against whom the pressure is exerted is in a direct business relation with the employer with whom the union has

a primary dispute.[2] Similarly, the objective underlying Section 8(b)(4)(B) is furthered by interpreting that section as applying in the circumstances here. As the Board pointed out (Pet. App. 12a–13a):

> Northridge and Candelaria are engaged in businesses which, as the stipulated record discloses, expand through construction of new facilities. * * * As a general contractor in the construction industry in the area where both Northridge and Candelaria operate, Reimann remained within that class of employers to whom future construction contracts might be awarded. Thus, it is apparent that at the very least an object of the picketing was forcing and requiring Northridge and Candelaria to refrain from utilizing Reimann's services for any future construction.[3]

There was nothing improper about the Board's taking such obviously relevant factors into account.

2. Contrary to petitioner's contention (Pet. 9–13), the instant decision does not conflict with *National Labor Relations Board* v. *Fruit & Vegetable Packers*

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[2] See, *e.g.*, *National Labor Relations Board* v. *Washington-Oregon Shingle Weavers*, 211 F. 2d 149, 151–152 (C.A. 9); *National Maritime Union* v. *National Labor Relations Board*, 346 F. 2d 411, 416–420 (C.A. D.C.), certiorari denied, 382 U.S. 840; *Miami Newspaper Pressmen's Local No. 46* v. *National Labor Relations Board*, 322 F. 2d 405, 410 (C.A. D.C.).

[3] *Hoffman* v. *Joint Council of Teamsters No. 38*, 230 F. Supp. 684 (N.D. Cal.), cited by petitioner (Pet. 8), arose on a petition for a temporary injunction under Section 10(l) of the Act. To the extent that the views reflected therein support petitioner, they were rejected by the court of appeals when it subsequently reviewed the Board's final order in that case. *National Labor Relations Board* v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23, 26–27 (C.A. 9).

that the picketing was only an appeal to its customers

& Warehousemen, Local 760 (Tree Fruits), 377 U.S. 58. In *Tree Fruits*, the union, which had a dispute with the growers of certain apples, picketed at a retail store selling those apples, with signs appealing to customers of the store not to buy that product. The store was advised not to buy the "struck" apples, and that the pickets would refrain from any action inconsistent with such a limited objective; they in fact did so (*id.* at 60–61, 73–76). In those circumstances, the Court held that consumer picketing, where so confined, did not constitute "restraint or coercion" within the meaning of subparagraph (ii) of Section 8(b)(4), for, "if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product" (*id.* at 72). At the same time, however, the Court noted that, "when consumer picketing is employed to persuade customers not to trade at all with the secondary employer," the picketing falls within the section's proscription because such employer "stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally"; in such case, "the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer" (*ibid.*).

The Board properly concluded that the instant case presents a situation where the picketing was not closely confined to the primary dispute, but, rather, was employed to persuade customers "not to trade at all" with the neutrals. Thus, as the Board noted (Pet. App. 16a), "the location and timing" of the picketing

disclosed that "it was designed to avoid a confrontation with the primary employer and his employees." Moreover, neither Hyatt Lodge nor Farrell's sold the "product" of the primary dispute, *i.e.*, buildings, to its customers, as did the store in *Tree Fruits*. Accordingly, in appealing to the customers of Hyatt Lodge and Farrell's not to use the buildings constructed by Reimann, the Union was necessarily calling for a boycott of the entire operations of those businesses. See *National Labor Relations Board* v. *Building Service Employees Int'l Union, Local No. 105*, 367 F. 2d 227, 229 (C.A. 10); *National Labor Relations Board* v. *Local 254, Bldg. Service Employees Int'l Union*, 359 F. 2d 289, 292 (C.A. 1), certiorari denied, 389 U.S. 856.

3. Finally, there is no substance to petitioner's contention (Pet. 10–12) that the Board must prove consequent economic loss or some other manifestation of coercion apart from the picketing itself, in order to warrant the application of Section 8(b)(4)(B) to secondary consumer picketing of the type involved here. As the *Tree Fruits* opinion makes explicit, Congress decided, in enacting the 1959 amendments to the Act, that "picketing which persuades the customers of a secondary employer to stop all trading with him was * * * to be barred" (377 U.S. at 71). Where, as here, that "isolated evil" is shown to exist, absence of proof of economic injury is immaterial. Nor is any constitutional problem presented (see Pet. 12–13) in interdicting secondary picketing which seeks to at-

tain such an illegal objective. See *Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 705.[4]

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
GARY GREEN,
Attorney,
National Labor Relations Board.

MAY 1968.

[4] Petitioner's remaining argument (Pet. 13–16) relates to certain findings which were unnecessary to the Board's ultimate decision. Thus, petitioner contends that there was no evidentiary support for the finding that the Union failed to picket at Reimann's general office and that the Union had made a prior threat of blacklisting. However, as the Board's decision shows, the finding of a prohibited object rests, not on these matters, but, rather, upon the timing and location of the picketing, the wording and implication of the picket signs, and the Union's failure to adopt techniques designed to mitigate the foreseeable consequences of such picketing (Pet. App. 14a).

U.S. GOVERNMENT PRINTING OFFICE: 1968